Tan Kit Theng v RHB Finance Bhd & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–348 OF 1998–III(II)
MUHAMMAD KAMIL J
8 APRIL 1999

Land Law — *Restraint on dealings — Caveat — Caveatable interests — Whether pending actions in court sufficient to clothe registered proprietor with caveatable interest over own land*

The plaintiff and his brother (deceased) were co-proprietors of a plot of land ('the parent land') in Samarahan. They had entered into a development agreement with a developer. Under the agreement, the developer was to transfer half of the parent land (approximately 2.149 hectares/5.31 acres) to the plaintiff after it had been partitioned and subdivided. The developer subdivided the parent land into sublots and transferred a plot with an approximate area of only 1.9483 hectares/4.814 acres. The plaintiff brought an action against the developer for breach of the agreement. An action was also brought against the financier and purchasers of two other sublots (Lot 2363 and 2400) and a caveat lodged against another sublot (Lot 2365). The Registrar of Land and Survey, Samarahan served on the plaintiff a notice that the caveat would lapse on the expiration of three months. The plaintiff applied to extend the caveat until the trial of the actions.

Held, dismissing the application with costs:
To maintain a caveat, the plaintiff must show that he has a caveatable interest in the land. As a registered proprietor, he can only caveat his own land if he can show circumstances that affirmatively give rise to a distinct interest in the land other than his beneficial interest as proprietor (see p 535G–H). The plaintiff has failed to establish that he has a caveatable interest. The two actions pending in the court are not sufficient to clothe the plaintiff with a caveatable interest (see p 536 G–H).

[Bahasa Malaysia summary

Plaintif dan abangnya (si mati) adalah pemilik bersama sebidang tanah ('tanah utama tersebut') di Samarahan. Mereka telah memasuki perjanjian kemajuan dengan pemaju. Di bawah perjanjian tersebut, pemaju akan memindah milik setengah daripada tanah utama (lebih kurang 2.149 hektar/5.31 hektar) kepada plaintif selepas tanah utama tersebut dipecahkan dan dibahagikan. Pemaju tersebut telah membahagikan tanah utama kepada lot kecil dan telah memindah milik sebidang tanah dengan kawasan yang lebih kurang 1.9483 hektar/4.814 ekar. Plaintif telah membawa tindakan terhadap pemaju untuk pemecahan perjanjian tersebut. Satu tindakan telah dibawa terhadap pembiaya dan pembeli-pembeli dua lot kecil (Lot 2363 dan 2400) dan satu kaveat telah dimasukkan terhadap satu lot yang lain (Lot 2365). Pendaftar Tanah dan Mengukur di Samarahan telah

memberi notis kepada plaintif bahawa kaveat akan luput selepas tamatnya tiga bulan. Plaintif telah memohon untuk melanjutkan kaveat sehingga perbicaraan tindakan tersebut.

Diputuskan, menolak permohonan tersebut dengan kos:
Untuk mengekalkan kaveat tersebut, plaintif mestilah menunjukkan bahawa beliau mempunyai kepentingan yang boleh dikaveatkan di atas tanah. Sebagai seorang tuan punya berdaftar, beliau hanya boleh mengkaveatkan tanahnya sendiri jika beliau boleh menunjukkan keadaan yang boleh membangkitkan satu kepentingan dalam tanah selain daripada kepentingan benefisial seorang pemilik (lihat ms 535G–H). Plaintif telah gagal untuk menunjukkan bahawa beliau mempunyai kepentingan yang boleh dikaveatkan. Kedua-dua tindakan tersebut yang belum selesai di mahkamah tidak mencukupi untuk memberikan plaintif satu kepentingan yang boleh dikaveatkan (lihat ms 536G–H).

Notes

For cases on caveatable interest, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2328–2380.

Cases referred to

Barry v Heider & Anor (1914) 19 CLR 197(refd)
Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437(refd)
Great West Permanent Loan Co v Friesen & Ors [1925] AC 208(refd)
Haupiri Courts Ltd (No 2), Re An application by [1969] NZLR 353 (refd)
Kuland Development Sdn Bhd v Tho Shaw Ping Originating Summons No 24–30–97–III/II (unreported) (refd)
Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim [1993] 3 MLJ 231(refd)
Teo Eng Jin v Hing Kim Pong Originating Motion No K11 of 1978 (unreported) (refd)
Wong Fook Seng v Mrs Fredericks nee Khoo Swee Choo [1998] 6 MLJ 321 (refd)

Legislation referred to

Sarawak Land Code (Cap 81) ss 173, 174, 178

Fabian Lim (*Lim & Lim*) for the plaintiff.
Tony Ling (*HC Lee & Partners*) for the first defendant.
Alvin Chong (*Alvin Chong & Partners*) for the second and third defendants.

Cur Adv Vult

Muhammad Kamil J: On 29 May 1998 the plaintiff, the caveator, lodged Caveat No L 1255/1988 on Lots 2363, 2365 and 2400 Block 24 Muara

A Tuang Land District ('the said lands'), at the Samarahan Land Registry. The Registrar of Land and Survey, Samarahan had served on the plaintiff a notice under s 178 of the Sarawak Land Code (Cap 81) that the caveat would lapse on the expiration of three months of the notice. This is the plaintiff's application to extend the caveat until the trial of the plaintiff's actions against the defendants and Rich Baron Sdn Bhd, the developer of
B the said land.

The application is supported by the affidavits of Tan Kit Theng @ Tan Kheng Meng affirmed on 26 November 1998 and 11 January 1999. The application is opposed by the first defendant's affidavit of Lee Heng Cheong affirmed on 28 December 1998 and the second and third defendants'
C affidavits of Seow Chaw Jiew affirmed on 18 December 1998 and 26 January 1999.

The plaintiff and his brother (deceased) were co-proprietors (in undivided shares) of a plot of land ('the parent land'), and they had entered into a development agreement with Rich Baron Sdn Bhd ('the developer'). Under the agreement it was agreed that after the partition and subdivision
D of the parent land, $^1/_2$ share of the parent land, aproximately 2.149 hectares or 5.31 acres, would be transferred to the plaintiff. Rich Baron Sdn Bhd transferred an area of 1.9483 hectares or 4.814 acres, which is less than $^1/_2$ share of the parent land as agreed. The plaintiff allege that there is a shortage of 0.20 hectare or 0.496 acres which means that the developer had
E breached the development agreement. Thus, the plaintiff brought an action against the developer for breach of the agreement.

The defendants in this action submitted that under s 173 of the Sarawak Land Code (Cap 81), a registered proprietor cannot caveat his own land and cited the case of *Sharifah Mastura bte Tuanku Ibrahim v Wan*
F *Aziz Ibrahim* [1993] 3 MLJ 231 on this point. Further the caveat was defective as it did not conform to the provisions of s 174 of the Land Code in that the plaintiff had failed to state with certainty the nature of the estate and beneficial interest in the said land. The case in support cited was *Kuland Development Sdn Bhd v Tho Shaw Ping* (Originating Summons No 24-30-97-III/II (unreported)).

G To maintain a caveat, the caveator must show that he has a caveatable interest in the land. A registered proprietor can caveat his own land if he can show circumstances that affirmatively give rise to a distinct interest in the land other than the fact that he is a registered proprietor. In other words, the proprietor must show a caveatable interest other than by virtue of his beneficial interest as a proprietor. It is upon him to discharge the onus of
H proving of the circumstances that he has a caveatable interest in the land. See *Barry v Heider & Anor* (1914) 19 CLR 197; *Great West Permanent Loan Co v Friesen & Ors* [1925] AC 208; *Re an application by Haupiri Courts Ltd (No 2)* [1969] NZLR 353; and *Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim.*

I Learned counsel for the second and third defendants, Mr Alvin Chong submitted that under the development agreement the plaintiff had agreed that his share of the parent land (ie Lot 2403) shall be for agricultural purposes. Now, the plaintiff is alleging that his Lot 2403 is smaller than the

1/2 share as agreed, and that sublots 2363, 2365 and 2400, which in fact had been changed into residential purpose lots, had encroached on to his Lot 2403. As the agreed 1/2 share (approximately) of the plaintiff was 1.9483 hectares, it had been transferred and accepted by the plaintiff without a murmur. Under clause 19 of the development agreement, it is clearly provided that the mutual rights of the parties shall remain unaffected by the size of the plaintiff's 1/2 share of the parent land.

Clause 4 of the development agreement and para 7 of the power of attorney allowed the developer to sell Lots 2363, 2365 and 2400. The developer had sold sublots 2363 and 2400 to the second and third defendants, financed by loans from the first defendant. The sale of these sublots was agreed to by the plaintiff. Now the plaintiff alleges that he was induced to agree to the sale by the developer's fraud. Thus he brought a second action against the developer for such fraud, and prayed for a declaration that the sale to the second and third defendants be set aside.

In my view, the pending actions brought by the plaintiff against the defendants and Rich Baron Sdn Bhd do not clothe the plaintiff with a caveatable interest in the said land. As a registered proprietor he may enforce his rights against the developer for loss and damages. The action against the developer for loss and damages has no connnection with the said land.

As to the second action against the developer for misrepresentation and fraud perpetrated by the developer, it does not form the basis in support of the plaintiff's action for the caveat. Here, the plaintiff's caveat was solely based on the statutory declaration, which stated the plaintiff's contractual rights via-a-vis the plaintiff's allegation of misrepresentation and fraud. Apparently this was an after thought. See *Kuland Development Sdn Bhd v Tho Shaw Ping*, (orginating summons No 24-30-97-III/II (unreported)); *Teo Eng Jin v Hing Kim Pong* (Orignating Motion No K11 of 1978 (unreported)).

In *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437, the Court of Appeal held that a caveatable interest is a sine qua non for the purpose of sustaining the caveat. See *Wong Fook Seng v Mrs Fredericks nee Khoo Swee Chew* [1998] 6 MLJ 321.

After hearing the evidence before the court and the submissions of the counsels, I find that the caveator had failed to establish that he has a caveatable interest for the reasons stated above. The two actions pending in the court are not sufficient to clothe the plaintiff with a caveatable interest. I would dismiss the application with costs.

Application dismissed with costs.

Reported by Joel Ng